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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,
Petitioner

v.

CARL SHELDON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the United States Court of Appeals for the Tenth Circuit in Case No. 84-1322, Carl Sheldon, Plaintiff-Appellant vs. Unit Rig & Equipment Company, an Oklahoma corporation, Defendant-Appellee issued by the Court 28 July 1986, reported in 797 F.2d 883-888, (Petition For Rehearing Denied 29 September 1986) was contrary to the Wyoming Comparative Negligence Statute (W.S. 1977 §1-1-109), and to the decisions of the Wyoming Supreme Court interpreting said statute.

2. Whether, in light of *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, and 28 U.S.C. §1652, a United States Federal Court can lawfully overrule and nullify the Wyoming Statute and the interpretations of said statute by the Wyoming Supreme Court.

PARTIES

The caption of this case contains the names of the parties.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 797 F.2d 883 (Appendix A).

No opinion was published by the District Court. The Judgment on Jury Verdict of the United States District Court for the District of Wyoming and Order of the Court of Appeals denying appellee's petition for rehearing are attached as Petitioner's Appendices B and C, respectively.

STATEMENT OF JURISDICTION

This Court has jurisidiction to review the decision pursuant to:

1. The decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188 and subsequent cases adopting the rule that it is the duty of Federal Courts to follow state decisions on matters of general law.

2. 28 U.S.C. §1652 (state laws as rules of decisions).

3. Supreme Court Rule 17.1(a).

DATE OF OPINION SOUGHT TO BE REVIEWED

The opinion sought to be reviewed was issued July 28, 1986.

DATE OF DENIAL OF PETITIONER'S PETITION FOR REHEARING

Petitioner's "Petition for En Banc Hearing" was denied by the United States Court of Appeals for the Tenth Circuit on 29 September 1986.

STATUTES INVOLVED

The statute of the State of Wyoming with which the decision of the Court of Appeals is in conflict is Wyo. Stat. § 1-1-109 (1977), Comparative Negligence (Appendix D), and the decisions of the Supreme Court of Wyoming construing the statute.

STATEMENT OF THE CASE

The basis for jurisdiction of the United States District Court for the District of Wyoming in the first instance, is diversity of citizenship of the parties and the amount in controversy exceeds $10,000. 28 U.S.C. §1332.

A statement of the case made by the Circuit Court adequately presents the factual and procedural background:

> "On May 20, 1980 appellant was injured severely when a 120-ton capacity haulage truck collided with his pickup truck at a uranium mine near Riverton, Wyoming. Appellant commenced the instant action against the manufacturer, Unit Rig, alleging breach of warranty and negligence in the designing, testing, and manufacturing of the Lectra Haul. Federal American Partners, appellant's employer, although immune from suit under Wyoming's worker's compensation law, was before the jury for the purpose of assessing its percentage of fault.
>
> Appellant served as a scraper foreman at the open pit uranium mine. On May 20, appellant reported to work at approximately 3:00 p.m., approximately one-half hour before work shifts were to change. By 3:30 p.m. two electric shovels, used to load uranium ore from the pit into haulage trucks, were out of service. Because of this delay, five or six haulage trucks were lined up waiting to be filled. The driver of one of the haulage trucks, Steve Callahan, got out of his truck to speak with a co-worker.

Appellant noticed that, contrary to work rules, Callahan was not wearing his shirt. Appellant drove his pickup truck over to Callahan's Lectra Haul. Appellant parked the pickup truck parallel to the Lectra Haul, between the right front and rear wheels. By this time, Callahan had re-entered the cab of the Lectra Haul, turned the wheels of the vehicle to the right, and moved the Lectra Haul forward. Appellant by then had walked toward the front of the cab. Seeing the Lectra Haul was beginning to move, appellant ran to his dwarfed pickup. There was evidence that appellant tried to put the pickup in reverse to avoid the collision. The Lectra Haul, however, pinned the pickup truck, crushing the left hand portion of the truck with appellant inside. Appellant sustained severe injuries as a result of the collision.

Appellant's claims against the manufacturer, appellee Unit Rig, were based on negligence and breach of warranty. Essentially, appellant alleged that the Lectra Haul had an ineffective side and rear view mirror system which left a significant blind spot in the driver's scope of vision.

Following the presentation of evidence, which included testimony of expert witnesses, the jury was instructed to assess the percentages of negligence of the three participants—appellant Sheldon, appellee Unit Rig, and appellant's employer, Federal American Partners. Although the latter was immune from suit, its negligence had to be determined for purposes of the Wyoming comparative negligence law. The jury was instructed that, in order for appellant to recover any damages in negligence, the jury had to find Unit Rig more negligent than appellant. Counsel also explained this aspect of Wyoming comparative negligence in closing arguments. . . .

> The jury found that appellant's damages totalled $540,000. It assessed the percentages of negligence as follows: appellant—40%; Unit Rig—30%; Federal American Partners—30%. Since *the jury found appellant more negligent than Unit Rig,* the court entered judgment for Unit Rig, and denied motions for an amended judgment and new trial. This appeal followed." [Emphasis supplied.]

In resolving the appeal, the Circuit Court said that the District Court had adequately instructed the jury on Appellant's two theories of recovery, negligence and warranty. The court also agreed that existing precedent in Wyoming statutory law in effect at the time of the injury precluded recovery under a negligence theory where the plaintiff is found more negligent than the party against whom the recovery is sought, saying at page 886 (Appendix A), "We agree with the district court that the jury's percentage attribution of fault precluded appellant from recovering damages under a negligence theory."

Nevertheless, the Circuit Court held that "[A]ppellant's contributory negligence did not bar recovery completely under a warranty theory, . . ." and, *even though no finding of a breach of warranty had been made by the jury,* remanded to the District Court with instructions to enter judgment for Appellant in the amount of $324,000, saying: "This represents the jury's assessment of the damages he incurred, less Appellant's percentage of negligence." (797 F.2d 883, at 888.)

The purported basis for that holding was the circumstance that the Wyoming Supreme Court had said in *Cline v. Sawyer,* 600 P.2d 725, 732 (Wyo. 1979) (Appendix E), and repeated in a later opinion concerning the same controversy in *Cline v. Sawyer,* 618 P.2d 144, 147 (Wyo. 1980) (Appendix F), "Contributing fault is a proper consideration in fixing damages in *construction contract* cases premised on breach of warranty." (Emphasis added.)

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

I

THE CLINE v. SAWYER CASES

In the case of *Cline v. Sawyer*, 600 P.2d 725 (Wyo. 1979), the owners of a trailer court, who had contracted for the installation of sewer and water lines, sued the contractor for defective installation. The trial court had issued findings of fact and conclusions of law, which the Supreme Court, on appeal, said were "sufficient" in a contract action. However, in view of the answer having set forth a defense to a negligence action, the case was remanded for supplementation of the findings and conclusions to comply with Wyoming's comparative negligence statute (W.S. § 1-9-109 (1977)). As authority for the remand the court at 600 P.2d 732 said:

> "In construction contracts, there is an implied warranty that the work will be performed in a skillful, careful, diligent and workmanlike manner. Where negligence on the part of the contractor results in a breach of this warranty, a cause of action ex contractu and a tortious action premised on negligence, or both, are available to the contractee. Ferguson v. Town Pump, Inc., Mont., 580 P.2d 915 (1978); Gilley v. Farmer, 207 Kan. 536, 485 P.2d 1284 (1971); McFeeters v. Renollet, 210 Kan. 158, 500 P.2d 47 (1972); National Fire Insurance Company of Hartford v. Westgate Construction Co., U.S.D.C. Del., 227 F. Supp. 835 (1964); Tavares v. Horstman, Wyo., 542 P.2d 1275 (1975); New Trends, Inc. v. Stafford-Lowdon Co., Tex. Civ. App., 537 S.W.2d 778 (1976); 1 C.J.S. Actions §47, pp. 1104, 1105; 17A C.J.S. Contracts §§494(2)b and 525(1); 65 C.J.S. Negligence §4(6); 17 Am. Jur.2d, Contracts §371. See Brubaker v. Glenrock Lodge International Order of Odd Fellows, Wyo., 526 P.2d 52 (1974).

"Although it is sometimes said that contributory negligence will not preclude recovery in construction contract cases premised on breach of this warranty, but will be considered in fixing the amount of damages, 17 Am.Jur.2d, Contracts § 371, p. 815, consideration of such in Wyoming is rendered moot by the enactment of §1-1-109 relative to comparative negligence. It requires the apportionment of damages on the basis of fault unless the contributory negligence was as great as the negligence of the person against whom damages are sought. Assumption of risk is a form of contributory negligence in Wyoming. Ford Motor Company v. Arguello, Wyo., 382 P.2d 886 (1963); Sanders v. Pitner, Wyo., 508 P.2d 602 (1973)."

It is noteworthy that the Court's statement regarding "implied warranty" was limited to "construction contracts."

The same restriction was stated by the Wyoming Supreme Court in the appeal, following the trial court's findings of fact and conclusions of law, on the remand, where at 618 P.2d 144, 147 the Court said:

"As noted in our first opinion in this matter, contributing fault is a proper consideration in fixing damages *in construction contract cases* premised on breach of warranty, 600 P.2d at 732." [Emphasis supplied]

Accordingly, the Circuit Court's statement of its basis for reversal (797 F.2d 883, 887) does not bear scrutiny:

"More recently, in Cline v. Sawyer, 618 P.2d 144 (Wyo. 1980), the court reviewed a case involving claims for both negligence and breach of warranty. The court concluded that sufficient evidence supported the finding that the defendant plumbing contractor was 100% negligent and had breached its implied warranties. More relevant to the instant

> case, the court reiterated its view that 'contributing fault is a proper consideration in *fixing damages* in construction contract cases premised on breach of warranty' (emphasis added) (citing Cline v. Sawyer, 600 P.2d 725, 732 (Wyo. 1979), where the trial court was instructed on remand to assess the percentage of negligence of all participants). Since the defendant in Cline was found 100% negligent, the court was not required to address the discrete interplay of the Wyoming comparative negligence statute in a multi-participant case where there is contributory negligence on the part of the plaintiff and a claim for breach of warranty. We believe it is significant that the court referred to contributory negligence affecting *damages,* not liability." [Emphasis in original.]

Review of the Wyoming Supreme Court's *Cline v. Sawyer* cases, dealing with warranty in construction contract cases, discloses that the Wyoming Court's statement, quoted by the Circuit Court at 799 F.2d 687 that, "Contributing fault is a proper consideration in *fixing damages* in construction contract cases premised on breach of warranty" [emphasis Circuit Court's] did *not* allude or relate to Wyoming's Comparative Negligence statute. Rather, it was based on a statement of the general law in 17 Am. Jur.2d *Contracts* §371 p. 815. Further, it was employed by Judge Rooney in explaining that, under the *general* law governing construction contracts, "Where negligence on the part of the contractor results in a breach of this warranty, a cause of action ex contractu and a tortious action premised on negligence, or both are available to the contractee." *Cline v. Sawyer,* 600 P.2d 723, 732.

That explanation was given by the Wyoming Supreme Court, so that, on remand, the trial court could make a finding on the negligence theory, as well as on the contract theory.

Therefore, the statement on which the Circuit Court relied for reversal of the Unit Rig/Sheldon judgment had no bearing on the application of Wyoming's Comparative Negligence statutes or breach of warranty claim in a products liability case, raising the issue of design and testing.

However, it is pivotal that the Wyoming Court quoted and discussed the State's Comparative Negligence statute, addressing the *assumption of risk* aspect.

II

WISCONSIN, FROM WHICH WYOMING TOOK ITS COMPARATIVE NEGLIGENCE STATUTE, APPLIED THAT STATUTE TO PRODUCTS LIABILITY LITIGATION

Appellant and Appellee agree "That this is a products liability case raising the issue of design and testing." (Brief of Appellant and Brief of Appellee below at page 12 of each brief (Appendix G and H respectively).)

The pronouncement of the Wyoming Supreme Court in *Board of County Commissioners v. Ridenour,* 623 P.2d 1174, 1185 (Wyo. 1981), regarding the influence of the Wisconsin comparative negligence statute and that state's interpretation are significant:

> "Finally and also importantly, we are bound by Woodward v. Haney, Wyo. 1977, 564 P.2d 844, where, when asked to construe the Wyoming Comparative Negligence Act, this court stated:
>
> '* * * Where a statute that has been construed by the court of last resort of another state has been enacted in the same terms by the Wyoming Legislature, the Legislature is presumed to have adopted it as a part of the law and intended the same construction apply in this state. * * *' Id., 564 P.2d at 845.

> The conclusion was then reached that the legislature intended 'to adopt the Wisconsin judicial construction of the comparative negligence statute at the date of enactment. * * *' Id., at 846. We have, therefore, already decided the question. The precedent of this court should have some stability and should be abandoned only when there is no longer any reason for the rule. It gives us a firm anchor in this case."

Accordingly, the holdings in the Wisconsin products liability cases are precedent in Wyoming.

Although the Wyoming Supreme Court did not adopt the doctrine of strict liability until March 1986, in *Timothy Ogle v. Caterpillar Tractor Company,* 716 P.2d 334 (Wyo. 1986) that Court for many years has been aware of its existence, and has discussed the rule in A.L.I. Restatement of the Law, Second (Torts) 402A. *Maxted v. Pacific Car & Foundry Co.,* 527 P.2d 882 (Wyo. 1974); *Chrysler v. Todorovich,* 580 P.2d 1123 (Wyo. 1978); *Caterpillar Tractor Company v. Donahue,* 674 P.2d 1276 (Wyo. 1983); *O'Donnell v. City of Casper,* 696 P.2d 1278 (Wyo. 1985).

A review of the Wisconsin products liability cases discloses that comparative negligence was uniformly recognized as a defense in that jurisdiction.[1]

In *Dippel v. Sciano,* 155 N.W.2d 55, 63, 64, the Court said:

> "The defense of contributory negligence is available to the seller. The plaintiff has the duty to use ordinary care to protect himself from known or readily apparent danger. Defenses among others that suggest themselves are that the product must be reasonably used for the purpose for which it was intended; abuse or alteration of the product may

1. A comprehensive discussion of Wyoming Comparative Negligence statute and strict tort liability, as employed in Wisconsin, appears in University of Wyoming, College of Law, *Land and Water Law Review,* Volume XVIII, n. 2, pp. 643-669, entitled "Comparative Negligence and Strict Liability—A Marriage of Necessity."

relieve or limit liability, some products just naturally wear out in such a manner as to render them unsafe and as to others, the intended use can be coupled with inherent danger—anyone can cut his finger with a sharp knife or puncture it with a fish-hook, and teeth can be damaged by the sugar in the consumption of soft drinks."

To a similar effect see, *Howes v. Deere & Co.*, 238 N.W.2d 76, 80 (Wis. 1976):

> "We have pointed out a number of times that although the term 'liability' or 'strict liability' is used in referring to the negligence per se doctrine, the use of the terms does not make the manufacturer or seller an insurer, nor does it impose absolute liability. It has been suggested that it is inconsistent to say that a seller or manufacturer is liable but not an insurer. Perhaps a literal use of the words would lead to this conclusion, but this is not so under our concept of comparative negligence. Among other things, the plaintiffs must prove that the defect was a cause (a substantial factor) of the plaintiffs' injuries or damage. Dippell, supra, 37 Wis.2d p. 460, 155 N.W.2d 55; Arbet v. Gussarson (1975), 66 Wis.2d 551, 557, 225 N.W.2d 431. Other defenses are also available, including contributory negligence, both on the part of the plaintiff, Schuh v. Fox River Tractor Co. (1964), 63 Wis.2d 728, 218 N.W.2d 279, and other possible tortfeasors, Arbet v. Gussarson, supra; Powers v. Hunt-Wesson Foods, Inc. (1974), 64 Wis.2d 532, 537, 219 N.W.2d 393."

In *Austin v. Ford Motor Company*, 273 N.W.2d 233, 240 (Wis. 1979), the wrongful death action arising from an automobile accident, the Court said:

> "[W]e believe it appropriate to discuss the applicability of the theory of breach of warranty where

the cause of action is strict liability in tort. We conclude that, in view of this court's development of the jurisprudence of products liability, it is inappropriate to bring an action for breach of warranty where a tort remedy is sought. See, Howes v. Hansen, 56 Wis.2d 247, 201 N.W.2d 825 (1972); Dippel v. Sciano, supra; and Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn.L.Rev. 791 (1966)."

Applying the Wisconsin Comparative Negligence law in *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 467 (7th Cir. 1984), a products liability suit, wherein a motorcycle owner, rendered paraplegic in an accident had appealed from an unsuccessful action against a manufacturer and distributor, the Court observed:

"As one court said recently, 'in a defective design case, there is no practical difference between strict liability and negligence. The test for an "unreasonably dangerous" condition is equivalent to a negligence standard of reasonableness. . . .' Birchfield v. International Harvester Co., 726 F.2d 1131, 1139 (6th Cir. 1984). The leading treatise on tort law is in agreement: 'The proof required of a plaintiff seeking to recover for injuries from an unsafe product is very largely the same, whether his cause of action rests upon negligence, warranty, or strict liability in tort.' Prosser, Handbook of the Law of Torts 671 (4th ed. 1971); see also Howes v. Deere & Co., 71 Wis.2d 268, 273-75, 238 N.W.2d 76, 79-80 (1976); Dippel v. Sciano, supra; Epstein, supra, at 40."

III

WYOMING IS NOT A PURE COMPARATIVE NEGLIGENCE STATE

The decision of the Circuit Court in the present case is contrary to and violative of the Wyoming Comparative Negli-

gence Statute, W.S. §1-1-109 (1977), the Wyoming cases interpreting it, as well as the Wisconsin cases interpreting the statute from which the Wyoming legislation was patterned.

The opinion in this case, without valid basis, and contrary to the wording to the Wyoming Comparative Negligence Statute, as well as the Wyoming Supreme Court opinions, so emasculates the statute as to give it the entirely erroneous interpretation, that Wyoming had adopted *pure* comparative negligence, whereas Wyoming is one of the states which had adopted the "Modified Comparative Negligence, 49% Rule."

In discussing "pure comparative negligence," the well known author Schwartz says:

> "Under this system a contributorily negligent plaintiff may recover even though his negligence was greater than defendant's, but his damage award will be reduced in proportion to the amount of negligence attributed to him. . . ."

Schwartz, in the following paragraphs at pages 30 and 31 explains the modified comparative negligence system, including the 50% system, saying:

> "The third and most popular form of *modified comparative negligence* is the 50% or Wisconsin system and its derivatives. Under this system as originally adopted in Wisconsin, plaintiff's contributory negligence does not bar his claim if it is less than that of a particular defendant but his damage award is reduced by the percentage that his fault contributed to the happening of the accident as a whole. If plaintiff's contributory negligence is equal to or greater than that of defendant, the common-law contributory negligence rule applies and *plaintiff receives nothing.* This system, now called the '49% rule,' is the law in Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, West Virginia, and *Wyoming.*" [Emphasis supplied.]

Callaghan, *Comparative Negligence Manual,* Revised Edition at Chapter 3, p. 227, 3.580 says:

> "In 1973 *Wyoming* adopted a comparative negligence statute which allows plaintiff to recover if his negligence 'was not as great' as the negligence of the person against whom recovery is sought." [Emphasis supplied]

IV

THE WYOMING PRODUCTS LIABILITY CASES

Both parties agree that this is a products liability case. It is therefore significant that Wyoming products liability cases, wherein negligence of the plaintiff was recognized as a defense and precluded recovery, include *Continental Motors Corporation v. Joly,* 483 P.2d 244 (Wyo. 1971); *Wells v. Jeep Corporation,* 532 P.2d 595 (Wyo. 1975); *Maxted v. Pacific Car and Foundry Co.,* 527 P.2d 832 (Wyo. 1974); and *Caldwell v. Yahama Motor Co. Ltd.,* 648 P.2d 512 (Wyo. 1982). In all of these cases, the plaintiff had charged breach of warranty, as in the present *Sheldon* case.

No Wyoming case, under any theory of recovery, including breach of an alleged warranty, has allowed recovery to a plaintiff claiming damages for an injury caused by a defective product, where the degree of negligence or fault of the plaintiff has been greater than that of a defendant manufacturer or dealer.

CONCLUSION

Because of the Circuit Court's misconstruction of the *Cline v. Sawyer* cases, and its failure to consider the Wyoming Supreme Court's application of the State's comparative negligence statute to products liability cases, the reversal should not be permitted to stand, thereby destroying the

Wyoming Comparative Negligence statute as drafted by the Wyoming Legislature and interpreted by the Wyoming Supreme Court. The reversal of this case is completely "result oriented" inasmuch as no finding of breach of warranty was ever made by the trier of fact. The Court of Appeals should not be allowed to arbitrarily substitute their opinion for the opinion of the trier of fact.

For the reasons herein set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GLENN PARKER
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BYRON HIRST
Attorneys for
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December 1986

APPENDIX A

Carl SHELDON, Plaintiff-Appellant,

v.

UNIT RIG & EQUIPMENT CO., an Oklahoma corporation, Defendant-Appellee.

No. 84-1322.

United States Court of Appeals, Tenth Circuit.

July 28, 1986.

On appeal from judgment entered in the United States District Court for the District of Wyoming, Ewing T. Kerr, J., against driver of pickup in his action for negligence and breach of warranty against manufacturer of haulage truck which struck pickup, the Court of Appeals, Timbers, Circuit Judge, sitting by designation, held that: (1) jury's finding that pickup driver was more negligent than manufacturer of haulage truck precluded pickup driver from recovering damages under negligence theory, and (2) jury's contribution of greater percentage of fault to pickup driver did not bar claim based on breach of warranty, but pickup driver's damages were to be reduced by his percentage of fault.

Reversed and remanded with instructions.

1. Sales 446(7)

Although court did not use the word "warranty" specifically, instructions set forth with sufficient clarity pickup truck driver's breach of warranty theory alleging that haulage truck which struck pickup had ineffective side and rearview mirror system which left significant blind spot in driver's scope of vision.

2. Products Liability 40

Under Wyoming law, jury's finding that pickup driver was more negligent than manufacturer of haulage truck which struck pickup precluded pickup driver from recovering damages under negligence theory. W.S.1977, § 1-1-109.

3. Negligence 101

Under Wyoming law, jury's attribution of greater percentage of fault to pickup driver than to manufacturer of haulage truck which struck pickup did not bar pickup driver's claim based on breach of warranty, but pickup driver's damages were to be reduced by his percentage of fault. W.S.1977, § 1-1-109.

John R. Hursh (William L. Miller, Holly Brown and Thomas A. Fasse of Central Wyoming Law Associates, Riverton, Wyo., with him on briefs), for plaintiff-appellant.

Glenn Parker and Thomas G. Gorman of Hirst & Applegate, Cheyenne, Wyo., for defendant-appellee.

Before McKAY, SETH and TIMBERS,* Circuit Judges.

TIMBERS, Circuit Judge.

Appellant Carl Sheldon appeals from a judgment entered December 14, 1983 on a jury verdict in the District of Wyoming, Ewing T. Kerr, *District Judge*. In this diversity action involving negligence and breach of warranty claims, the court entered judgement on the negligence claim against appellant and in favor of appellee Unit Rig & Equipment Co. ("Unit Rig"), an Oklahoma corporation which manufactures the "Lectra Haul", a 120-ton capacity truck which collided with a pickup truck operated by appellant on May 20, 1980, as a result of which appellant was severely injured. The court denied appellant's motions for an amended judgment and for a new trial.

The principal question on appeal is whether the jury's attribution of a greater percentage of fault to appellant than

to Unit Rig bars recovery completely for a claim based on breach of warranty. We hold that appellant is entitled to recover on his breach of warranty claim the damages assessed by the jury, reduced by the percentage of appellant's contributing fault. We therefore reverse the district court and direct that judgment be entered for appellant in amount of $324,000.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the primary issue of law raised on appeal.

On May 20, 1980 appellant was injured severely when a 120-ton capacity haulage truck collided with his pickup truck at a uranium mine near Riverton, Wyoming. Appellant commence the instant action against the manufacturer, Unit Rig, alleging breach of warranty and negligence in the designing, testing, and manufacturing of the Lectra Haul. Federal American Partners, appellant's employer, although immune from suit under Wyoming's worker's compensation law, was before the jury for the purpose of assessing its percentage of fault.

Appellant served as a scraper foreman at the open pit uranium mine. On May 20, appellant reported to work at approximately 3:00 p.m., approximately one-half hour before work shifts were to change. By 3:30 p.m. two electric shovels, used to load uranium ore from the pit into haulage trucks, were out of service. Because of this delay, five or six haulage trucks were lined up waiting to be filled. The driver of one of the haulage trucks, Steve Callahan, got out of his truck to speak with a co-worker. Appellant noticed that, contrary to work rules, Callahan was not wearing his shirt. Appellant drove his pickup truck over to Callahan's Lectra Haul. Appellant parked the pickup truck parallel to the Lectra Haul, between the right front and rear wheels. By this time, Callahan had re-entered the cab of the Lectra Haul, turned the wheels

of the vehicle to the right, and moved the Lectra Haul forward. Appellant by then had walked toward the front of the cab. Seeing that the Lectra Haul was beginning to move, appellant ran to his dwarfed pickup. There was evidence that appellant tried to put the pickup in reverse to avoid the collision. The Lectra Haul, however, pinned the pickup truck, crushing the left hand portion of the truck with appellant inside. Appellant sustained severe injuries as a result of the collision.

Appellant's claims against the manufacturer, appellee Unit Rig, were based on negligence and breach of warranty. Essentially, appellant alleged that the Lectra Haul had an ineffective side and rear view mirror system which left a significant blind spot in the driver's scope of vision.

Following the presentation of evidence, which included testimony of expert witnesses, the jury was instructed to assess the percentages of negligence of the three participants—appellant Sheldon, appellee Unit Rig, and appellant's employer, Federal American Partners. Although the latter was immune from suit, its negligence had to be determined for purposes of the Wyoming comparative negligence law. The jury was instructed that, in order for appellant to recover any damages in negligence, the jury had to find Unit Rig more negligent than appellant. Counsel also explained this aspect of Wyoming comparative negligence in closing arguments.[1] During its deliberations, the jury sent a note to the trial judge, apparently inquiring about the effect of its assessment of fault. The judge responded to the question outside the presence of counsel and without informing counsel. The record does not contain the exact language of the question or the response.

The jury found that appellant's damages totalled $540,000. It assessed the percentages of negligence as fol-

1. Under the statutory law of Wyoming, the jury must be instructed on the effect of its verdict. W.S. § 1-1-114 (1977). This statute applies to comparative negligence cases. *Johnson v. Safeway Stores, Inc.*, 568 P.2d 908 (Wyo.1977).

lows: appellant—40%; Unit Rig—30%; Federal American Partners—30%. Since the jury found appellant more negligent than Unit Rig, the court entered judgment for Unit Rig, and denied motions for an amended judgment and new trial. This appeal followed.

II.

The primary issue on appeal is whether appellant is entitled, on either a negligence or breach of warranty claim, to recover any damages for the injuries he sustained. Resolution of this issue requires an examination of appellant's legal theories for recovery. Appellant alleged that Unit Rig had negligently designed, tested and manufactured the Lectra Haul. Specifically, appellant alleged that the side and rear view mirror system left a blind spot which prevented the driver from seeing that appellant's pickup truck was parked along side the Lectra Haul.

[1] As a threshold matter, we are satisfied that the jury instructions covered adequately appellant's two legal theories of recovery. The court instructed the jury on the essential elements of negligence, including duty, breach, and proximate cause. In addition, the court defined the specific duties of a manufacturer relating to warranties and product defects, including the duty to anticipate that the Lectra Haul could be involved in blind side collisions while being used for the purpose for which it was intended; that the manufacturer's duty extended to other persons in the vicinity of the product; and that the manufacturer had a duty to inspect and test the product. Although the court did not use the word "warranty" specifically, we hold that the instruction set forth with sufficient clarity appellant's warranty theory.

Under the Wyoming comparative negligence statute, W.S. § 1-1-109 (1977), in effect at the time of the injury, the jury was required to assess the percentage of fault of each

of the participants.[2] Although Federal American Partners, appellant's employer, was immune from suit, the fault of this "ghost defendant" still had to be determined. Since the jury found appellant more negligent than Unit Rig—40% compared to 30%—the court disallowed appellant any recovery.

[2] We agree with the district court that the jury's percentage attribution of fault precluded appellant from recovering damages under a negligence theory. The Wyoming comparative negligence statute provides:

> "Contributory negligence shall not bar a recovery in an action by any person . . . to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of *the person against whom recovery is sought.* Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering."

W.S. § 1-1-109(a) (emphasis added). This statute was interpreted in *Board of County Commissioners v. Ridenour,* 623 P.2d 1174 (Wyo.1981). The Wyoming Supreme Court held that in a multi-defendant action, the statute requires that the plaintiff's percentage of negligence be compared separately with each of the defendants' negligence rather than with the sum of all the defendants' percentages of fault. Therefore, a plaintiff could not recover damages from an individual defendant found less negligent than the plaintiff. In addition, *Ridenour* held that the jury must consider the negligence not only of the parties to the action, but also the contributing fault of any participant in the transaction causing injury. The com-

2. We note that the 1986 Wyoming legislature amended the comparative negligence statute. The statute now provides that a plaintiff may recover where his contributing fault does not *exceed* that of the defendant. Thus, in a case where the plaintiff and an individual defendant both are found 50% negligent, the plaintiff may recover. 1986 Wyo.Sess.Laws ch. 24. The amended statute applies only to actions arising after June 11, 1986, however, and does not affect the instant case. 1986 Wyo.Sess.Laws ch. 24, § 4.

parative negligence statute ameliorates the harsh effect of any contributory negligence being a complete defense to a negligence claim. By comparing the plaintiff's fault against each of the individual defendants' fault, however, the plaintiff's likelihood of recovery is diminished significantly where more than one actor contributes to the injury, including the "ghost defendant" here.

In the instant case, the court properly instructed the jury to consider the fault of the employer even though Federal American Partners was not a "person against who recovery" was sought in the litigation. Since the jury found appellant more negligent than Unit Rig, we hold that the court correctly determined that appellant's contributing fault barred recovery under a negligence theory.

[3] This does not end our inquiry. We must decide whether appellant's claim for breach of warranty also is precluded by these comparative negligence principles. We hold that appellant is entitled to recover damages under his warranty theory but the damages must be reduced by his percentage of fault.

The Wyoming comparative negligence statute on its face does not resolve the warranty claim issue. The statute refers to an action "to recover damages for negligence." The statute does not refer explicitly to actions sounding in warranty or in strict liability. At the very least, the statute does not require that we preclude recovery in a warranty action where the jury finds that the plaintiff was contributorily negligent.

Appellee Unit Rig asserts that the contributory negligence on the part of appellant is a complete defense to an action for breach of warranty. We disagree.

In *Ridenour, supra,* The Wyoming Supreme Court dealt only with a negligence claim against the county for its breach of duty in designing and maintaining a county highway. No warranty claim was asserted. No products liability question was involved. We are not compelled to transplant mechanical-

ly the *Ridenour* preclusion of recovery theory where a plaintiff is found more negligent than a defendant to claims arising under a breach of warranty theory.

Prior to the adoption of the Wyoming comparative negligence statute, the Wyoming Supreme Court, in *Murphy v. Petrolane-Wyoming Gas Service,* 468 P.2d 969 (Wyo.1970), addressed the issue of whether tort defenses, such as contributory negligence and assumption of risk, apply to warranty claims. The court recognized the lack of unanimity on the matter, but noted that "[o]ne of the difficulties in precluding such defense is the consequent deprivation of an opportunity to show that the real cause of the injury was from another source than the agency furnishing the product." 468 P.2d at 975. This concern over the causation analysis, however, is inapplicable to the instant case. The verdict form, by attributing a percentage of fault to all the participants, effectively demonstrates the jury's view of causation. Although the *Murphy* court did not address in detail the specific effect of contributory negligence, the court did conclude that "a blanket exclusion of contributory negligence as a defense in breach-of-warranty cases is unjustified." 468 P.2d at 975. Thus, we conclude from the court's reasoning that a plaintiff's contributory negligence is entitled to some consideration in a breach of warranty action, even though such negligence may not preclude recovery according to the *Murphy* court. Pinpointing the effect of contributory negligence, however, is a more difficult question.

More recently, in *Cline v. Sawyer,* 618 P.2d 144 (Wyo.1980), the court reviewed a case involving claims for both negligence and breach of warranty. The court concluded that sufficient evidence supported the finding that the defendant plumbing contractor was 100% negligent and had breached its implied warranties. More relevant to the instant case, the court reiterated its view that "contributing fault is a proper consideration in *fixing damages* in construction contract cases premised on breach of warranty." (emphasis add-

ed) (citing *Cline v. Sawyer*, 600 P.2d 725, 732 (Wyo.1979), where the trial court was instructed on remand to assess the percentage of negligence of all participants). Since the defendant in *Cline* was found 100% negligent, the court was not required to address the discrete interplay of the Wyoming comparative negligence statute in a multi-participant case where there is contributory negligence on the part of the plaintiff and a claim for breach of warranty. We believe it is significant that the court referred to contributory negligence affecting *damages*, not liability.[3]

Based on the existing precedent in Wyoming and the silence of statutory law on the issue, we conclude that appellant's contributory negligence did not bar recovery completely under a warranty theory. The jury assessed appellant's damages at $540,000. Applying the relevant case law of Wyoming, we hold that it is appropriate to reduce appellant's damages by the percentage of his contributing fault, resulting in a net award of $324,000 damages to appellant. At oral argument before us, counsel for appellant stated that, if appellant were to be awarded his damages less his percentage of fault, no new trial would be sought and appellant's other claims of error would be withdrawn.[4]

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3. We note that other jurisdictions have reduced a plaintiff's damages in products liability cases, rather than barring recovery completely, where the product was misused or where the plaintiff's conduct contributed to the injury. *See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Texas 1977); and *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981).

   Appellant asserts that *Poland v. Goodyear Tire & Rubber Co.*, C83-0378 (June 24, 1984 D.Wyo.) provides further support for the proposition that contributory negligence does not bar recovery in a warranty action. Our review of the judgment in that case, however, sheds little light on the issue since we cannot discern on what legal theories of recovery the judgment was based.

4. As an alternate basis for requesting a new trial, appellant points to the trial court's communication with the jury outside the presence of counsel. While we certainly do not condone this contact with the jury on a critical matter in the case, in light of our holding and appellant's concession

III.

To summarize:

We hold that the district court adequately instructed the jury on the warranty claim for recovery. Although existing precedent in Wyoming and the statutory law in effect at the time of the injury precludes recovery under a negligence theory where the plaintiff is found more negligent than the party against whom recovery is sought, precedent does not compel this result on a warranty claim. Having held that appellant's contributing fault was not a complete bar to recovery on his warranty claim, we instruct the district court on remand to enter judgment for appellant in the amount of $324,000. This represents the jury's assessment of the damages he incurred, less appellant's percentage of negligence. We hold that this result is consistent with existing precedent in Wyoming. *See Cline v. Sawyer, supra.*

REVERSED AND REMANDED WITH INSTRUCTIONS.

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at oral argument, we need not determine whether such contact constituted reversible error. *But see General Motors Corp. v. Walden*, 406 F.2d 606, 610 (10th Cir.1969).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

CARL SHELDON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. C82-146-K
	)	
UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,	)	
	)	
	)	
Defendant.	)	

JUDGMENT ON JURY VERDICT

The above-entitled matter having come on for trial before the Court and a jury of six persons, and the issues having been duly tried and the jury having rendered its verdict whereby it apportioned relative degrees of fault as follows:

1. Defendant, Unit Rig & Equipment Co. - 30%
2. Federal American Partners - 30%
3. Plaintiff, Carl Sheldon - 40%.

NOW, THEREFORE, IT IS

ORDERED that by reason of the plaintiff's fault being established by the jury at 40% as compared to the 30% being assessed by the jury as against the defendant, Unit Rig & Equipment Co., the plaintiff, Carl Sheldon, shall take nothing by reason of his complaint, and that said complaint, together with the cause, be, and the same are, hereby dismissed with prejudice; it is

FURTHER ORDERED that each party shall pay its own costs.

DATED this 14th day of December, 1983.

EWING T. KERR
United States District Judge

APPENDIX C

SEPTEMBER TERM - SEPTEMBER 29, 1986.

Before the Honorable Monroe G. McKay, Honorable Oliver Seth and Honorable William H. Timbers*, Circuit Judges.

CARL SHELDON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 84-1322
	)	
UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,	)	
	)	
	)	
Defendant-Appellee.	)	

On consideration of appellee's petition for rehearing, the petition is denied by the panel who decided the appeal on the merits.

No active judge of the Court having requested en banc consideration, the suggestion for rehearing en banc is rejected.

ROBERT L. HOECKER, Clerk

By /s/Patrick Fisher
Chief Deputy Clerk

APPENDIX D

§ 1-1-109. Comparative negligence.

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial, direct the jury to find separate special verdicts;

(ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;

(iii) Inform the jury of the consequences of its determination of the percentage of negligence. (Laws 1973, ch. 28, § 1; 1977, ch. 188, § 1.)

APPENDIX E

Donald M. CLINE, Appellant
(Defendant),

v.

Thomas SAWYER and Loeva Sawyer,
Appellees (Plaintiffs).

No. 5100.

Supreme Court of Wyoming.

Sept. 24, 1979.

Owners of trailer court brought action against plumber to recover damages for allegedly defective work. The District Court, Sheridan County, Leonard McEwan, J., entered judgment in favor of owners, and plumber appealed. The Supreme Court, Rooney, J., held that: (1) trial court properly denied plumber's motion for dismissal based on ground that he, in his individual capacity, and not his corporation, was made a party, where record did not contain evidence that owners knew, or should have known, that they were entering into an agreement with plumber other than in his individual capacity; (2) trial court properly denied plumber's motion for change of judge where plumber's supporting affidavit did not state sufficient facts to show existence of bias or prejudice against him; and (3) trial court was obligated to make special finding of fact determining amount of damages and percentage of negligence attributable to each party.

Affirmed in part, and remanded.

1. Pretrial Procedure 557

In action by owners of trailer court against plumber for damages due to plumber's allegedly defective work, trial court properly denied plumber's motion to dismiss based on ground that he, rather than corporate entity, was made a party where

record did not contain evidence that owners knew, or should have known, that they were entering into an agreement with plumber other than in his individual capacity.

2. Judges 51(3)

Trial court properly denied defendant's motion for change of judge based on affidavit of prejudice which alleged, inter alia, that the judge and plaintiff had been close personal friends and continued to have close political affiliations and social relationships in the community, in that the affidavit did not reflect prejudgment of the case by the judge and did not reflect a leaning of his mind in favor of plaintiff to extent that it would sway his judgment or to extent that he would make his decisions in the matter other than on evidence placed before him. Rules of Civil Procedure, rule 40.1(b)(2).

3. Judges 49(1)

"Bias" which is ground for disqualification of a judge must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to conviction which evidence might produce. Rules of Civil Procedure, rule 40.1(b)(2).

See publication Words and Phrases for other judicial constructions and definitions.

4. Judges 50

Without a valid reason for recusal, a judge has a duty not to recuse himself.

5. Trial 392

A request for findings is not in nature of a request for answers to special interrogatories directed to the court; the request is only for findings which are sufficient to indicate basis or steps taken for decision upon contested matters. Rules of Civil Procedure, rule 52(a).

6. Damages 222
Negligence 97

Necessity for finding amount of damages and percentage of negligence attributable to each party is mandated in actions to recover damages for negligence resulting in death or in injury to person or property. W.S.1977, § 1-1-109(b).

7. Damages 222
Negligence 97

If action brought by owners of trailer court against plumber for damages due to plumber's allegedly defective work was only a contract action, findings determining amount of damages and percentage of negligence attributable to each party would not be necessary. W.S.1977, § 1-1-109(b).

8. Contracts 205, 324(1)
Negligence 102

In construction contracts, there is implied warranty that work will be performed in a skillful, careful, diligent and workmanlike manner; where negligence on the part of the contractor results in breach of this warranty, a cause of action ex contractu and a tortious action premised on negligence, or both, are available to the contractee.

9. Negligence 105

Assumption of risk is a form of contributory negligence.

10. Damages 222
Negligence 142

In action by owners of trailer court against plumber for damages due to plumber's allegedly defective work, trial court was obligated to make special findings of fact determining amount of damages and percentage of negligence attributable to each party where owners' negligence action had for its purpose recovery of damages for injury to their property and contributory negligence was an issue. W.S.1977, § 1-1-109.

Stuart S. Healy of Kennedy, Connor & Healy, Sheridan, for appellant.

Bruce P. Badley and Harlan W. Rasmussen of Badley, Rasmussen, Shoumaker & Newton, Sheridan, for appellees.

Before RAPER, C. J., and McCLINTOCK, THOMAS, ROSE and ROONEY, J. J.

ROONEY, Justice.

Appellant-defendant and appellees-plaintiffs entered into an oral contract whereby appellant was to perform plumbing work for appellees in connection with the installation of sewer and water lines in a trailer court being constructed by appellees in Sheridan. Appellees contended that the work was defective and that they were thereby damaged in the amount of $20,930.63.[1] After a trial to the court, judgment was entered in the amount of $8,400.60 in favor of appellees.

In his appeal from such judgment, appellant alleges error: (1) in denial of appellant's motion to dismiss the complaint (converted to a motion for summary judgment) for a defect in parties in that appellant and his wife were made parties defendant instead of Cline Plumbing and Heating, the corporate entity which carried on the plumbing business[2]; (2) in denial of appellant's motion for a change of judge based on an affidavit of prejudice; (3) for failure to enter findings of fact and conclusions of law on specified issues as requested by appellant; and (4) in that the findings of fact and judgment of the court were not supported by the evidence.

We agree with appellant's third contention in that the findings of fact and conclusions of law were inadequate and we

1. The complaint alleged damages in the amount of $21,225.06, but the amount was reduced to $20,930.63 on motion of appellant at the close of its case "to conform to the proof." The $8,400.60 judgment reflected an offset of $540.63 allowed appellant for uncompensated labor performed by him.
2. The complaint was dismissed as to appellant's wife as a result of the motion.

remand the case for revision or supplementation thereof. We address the first two contentions of appellant inasmuch as a holding favorable to appellant thereon would require a reversal rather than a remand of the case, but we affirm the trial court in these respects. The remand makes it unnecessary for us to consider the fourth contention of appellant.

CORPORATION AS A PARTY

The only affidavit, deposition or other verified material before the court at the time of its ruling on this issue was an affidavit of appellee Thomas Sawyer in which he stated that appellant had held himself out as an individual doing business as Cline Plumbing and Heating "without any reference to a corporation" at all times during the "dealings" between them. The contract between the parties was not in writing. The corporate name of appellant's business did not include the word "company" or the word "incorporated" or an abbreviation of either of these words. Appellant was the legally required master plumber for the business.

As indicated ante, there is a question as to whether this case was tried as a contract case or as a negligence case, or both.

The rule for tort liability is stated:

> "Of course, the individual by whom the tortious act is committed cannot himself escape liability on the ground that he was acting for the corporation. Such individual and the corporation are jointly liable and may be joined as defendants." 19 Am.Jur.2d, Corporations § 1427, p. 823.

The rule for contract liability is stated:

> "One who acts as agent for another in making a contract is individually liable thereon if, at the time of making the contract, he fails to disclose his agency and the identity of his principal, regardless of

whether or not he was authorized as agent to execute the contract. In such case, the agent is subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest. If the agent would avoid personal liability, the duty is on him to disclose his principal; it is not upon the party with whom the agent deals to discover the principal. * * *" 3 Am.Jr.2d, Agency § 317, pp. 674-675.

"* * * [I]t is the agent's duty to disclose his capacity as agent of a corporation if he is to escape personal liability for contracts made by him." *American Rent All, Inc. v. Culotta*, La.App., 328 So.2d 743, 744 (1976). See *Carlesimo v. Schwebel*, 87 Cal.App.2d 482, 197 P.2d 167 (1948); and 19 C.J.S. Corporations § 840.

[1] The record does not contain evidence that appellees knew, or should have known, that they were entering into an agreement with appellant other than in his individual capacity. The trial court properly denied appellant's motion in this respect.

CHANGE OF JUDGE

Appellant filed a motion pursuant to Rule 40.1(b)(2), W.R.C.P.[3] for a change of judge on the grounds that the presiding judge was "biased against" appellant and "in favor

3. Rule 40.1(b)(2) reads:
"(2) Disqualification for Cause.—After the time for filing a motion for peremptory disqualification of the presiding judge has expired, any party may move for a change of district judge on the ground that the presiding judge (A) has been engaged as counsel in the action prior to his election or appointment as judge, (B) is interested in the action, (C) is related by consanguinity to a party, (D) is a material witness in the action, or (E) is biased or prejudiced against the party or his counsel. The motion shall be supported by an affidavit or affidavits of any person or persons, stating sufficient facts to show the existence of such ground, together with an affidavit of the party's attorney showing that the facts stated were unknown to him and to the party and could not have been

of" appellees. Appellant's affidavit filed in support of the motion set forth the following as the reason for his belief "that he cannot receive a fair and impartial trial":

> "* * * [I]t has recently come to my attention that the presiding Judge, his Honor Leonard McEwan, and the Plaintiff, in this matter, Thomas Sawyer, have been close personal friends throughout the greater part of their lives; that they attended the University of Wyoming together and were closely associated at the University, and that they may have belonged to the same fraternities and associations; and that his Honor and the said Thomas Sawyer have had and continue to have close political affiliations and social relationships in the Sheridan community."

Appellant's attorney filed an affidavit that a motion for a peremptory challenge under Rule 40.1(b)(1), W.R.C.P.[4] was not timely filed[5] inasmuch as the information contained in appellant's affidavit had only recently become known to him.

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discovered by the exercise of reasonable diligence prior to the expiration of the time for filing a motion for peremptory disqualification. Prior to a hearing on the motion any party may file counter-affidavits. The presiding judge shall rule on the motion and if he grants the same shall immediately call in another district judge to try the action."

4. Rule 40.1(b)(1) reads:
"(1) Peremptory Disqualification.—A party may peremptorily disqualify a district judge by filing a motion requesting a change of judge. The motion must be filed at least fifteen (15) days before the date set for the hearing on any motion or application filed pursuant to Rule 12, 42, 56, 65, 71.1, or 72.1, or if there be no such motion hearing set, then at least fifteen (15) days before the date set for pretrial, and if there be no pretrial set, then at least fifteen (15) days before the date set for trial, or if the date is set within fifteen (15) days after the order of setting, within five (5) days after receipt of such order; provided, however, that no more than one (1) such motion shall be filed by the parties plaintiff or parties defendant. After the filing of such motion, the presiding judge shall forthwith call in another district judge to try the action."
5. At the time, a pretrial conference had been set and undertaken, and the matter was set for trial.

The motion was set for hearing; and while the record does not reflect it, counsel for the parties advised at oral argument that a hearing was held. An order was not entered, but another judge was not called in to try the action.

[2] The affidavit of appellant in support of the motion does not state "sufficient facts to show the existence" of bias or prejudice against appellant. The affidavit alleges that the judge and appellee Thomas Sawyer attended the same university at the same time where "they *may* have" belonged to the same fraternities or associations. Certainly such does not reflect a prejudgment of this case by the judge. It does not reflect a leaning of his mind in favor of appellees to the extent that it will sway his judgment or to the extent that he would make his decisions in the matter other than on the evidence placed before him. The affidavit further alleges that the judge and appellee Thomas Sawyer "have been close personal friends throughout the greater part of their lives * * * and * * * have had and continue to have close political affiliations and social relationships in the Sheridan community." Again, a prejudgment of the case is not indicated by these relationships, and they do not indicate such inclination toward appellees by the judge as would render him unable to exercise his judicial functions impartially.

[3] The words "bias" and "prejudice" are not synonymous. One cannot be prejudiced against another without being biased against him, but he can be biased without being prejudiced. Prejudice involves a prejudgment or forming of an opinion without sufficient knowledge or examination. Bias is a leaning of the mind or an inclination toward one person over another. The "bias" which is a ground for disqualification of a judge must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to the conviction which evidence might produce. See *Littrell v. State,* 22 Okl.Cr.App. 1, 209 P. 184 (1921); *Valdez v. Glenn,*

79 Wyo. 53, 330 P.2d 309 (1958), reh. den. 79 Wyo. 53, 332 P.2d 1119 (1958); *People v. Bonnerwith,* 69 Misc.2d 516, 330 N.Y.S.2d 248 (1972); *Evans v. Superior Court in and for Los Angeles County,* 107 Cal.App. 372, 290 P. 662 (1930); *Commonwealth Tobacco Co. v. Alliance Ins. Co.,* 238 Mass. 514, 131 N.E. 213 (1921); *Mitchell v. State,* 36 Tex.Cr.App. 278, 36 S.W. 456 (1896); *Temples v. Central of Georgia Ry. Co.,* 15 Ga.App. 115, 82 S.E. 777 (1914); *Rowe v. State,* 15 Ga.App. 660, 84 S.E. 132 (1915); *United States v. Irwin,* (10th Cir.), 561 F.2d 198 (1977).

A judge would not be very effective or efficient in a community the size of Sheridan[6], if he were bound to recuse himself from cases involving those with whom he had "close political affiliations and social relationships" or with whom he had been "a close personal friend throughout a greater part of" his life. There is no more of a disposition for a judge to rule in favor of an acquaintance or friend because of that fact than there is a disposition for him to rule against an acquaintance or friend because of that fact. The fact of friendship could result in a "leaning over backwards" to maintain impartiality, or it could result in the opposite. But an allegation of friendship, without more, is not sufficient to establish that either is likely to happen.

In response to a contention that the judge should be disqualified because of a close personal relationship with an associate of the defendant, the court said in *Firnhaber v. Sensenbrenner,* U.S.D.C. Wis., 385 F.Supp. 406, 412 (1974):

> "* * * If this were the appropriate standard for determining when recusal is necessary, either very few cases could be heard by the federal judiciary, or federal judges would be rendered hermits upon their appointment. * * *"

See *Plechner v. Widener College, Inc.* (3rd Cir.), 569 F.2d 1250 (1977); and *Hirschkop v. Virginia State Bar Ass'n,* U.S.D.C. Va., 406 F.Supp. 721 (1975).

6. The 1970 population of the city of Sheridan was 10,856.

[4] Without a valid reason for recusal, a judge has a duty not to recuse himself.

> "Recusal and reassignment is not a matter to be lightly undertaken by a district judge. While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation *not* to recuse ourselves; absent a valid reason for recusal, there remains what has sometimes been termed a 'duty to sit.' [Citations.]" *Simonson v. General Motors Corporation,* U.S.D.C. Pa., 425 F.Supp. 574, 578 (1976).

The trial court properly denied appellant's motion in this respect.

PROPRIETY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

[5] Toward the end of his opening statement, appellant made a request for specific findings of fact and conclusions of law with reference to the matter here on appeal as follows:

> "* * * [Y]our Honor, we would ask somewhat by way of conclusion on this that the Court enter specific findings of fact and conclusions of law in accordance with Section 1-1-109(b) of the Wyoming Statutes on comparative negligence and Rule 52(a) of the Wyoming Rules of Civil Procedure with respect to the comparative negligence issue and with respect to the * * *.
>
> * * * * * * *
>
> "* * * prior knowledge of the adverse ground water conditions of the area in terms of what we will assert was negligence on the part of the defendant. I would like the Court to address the question of the degree of care exhibited by the plaintiff—I did say defendant earlier, but I meant plaintiff—commencing and continuing through the construction operation ab-

sent the technical input and project certification of an engineer, we would like some finding concerning the absence of that expertise, the technical input—* * *.

* * * * * * *

"* * * we would ask the Court to consider the causal effects of plaintiff's damages resulting from the continuation of the plumbing aspects of his construction project from the fall of 1975 through the spring of '76 in view of repeated notices from the Department of Environmental Quality staff personnel that his plans were inadequate for the task. Finally, your Honor, we would like a finding concerning whether and to what extent the plaintiff contributed to his damages with respect to such things as the reject material, the impervious fill material recommended by the defendant, the choice of saddle fittings as opposed to the in-line fittings or 'Y' fittings recommended by the defendant and with respect to what will be termed 'sweat fittings' on the water pipes, choosing to solder water pipe connections instead of to fit them with the fittings that were recommended by the defendant * * *."

A request for findings under Rule 52(a), W.R.C.P.[7] are not in the nature of a request for answers to special interrogatories directed to the court. The request is only for findings which are sufficient to indicate the basis or steps taken for the decision "upon the contested matters" (see Rules Committee note of 1946).

7. The pertinent portion of Rule 52(a) reads:
"* * * Upon the trial of questions of fact by the court, or with an advisory jury, it shall not be ncessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties requests it before the introduction of any evidence, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing its special findings of fact separately from its conclusions of law; * * *."

"* * * Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485 (1943), reh. den. 320 U.S. 214, 63 S.Ct. 1444, 87 L.Ed. 1851 (1943).

[6] A request under § 1-1-109(b), W.S. 1977[8] is for the finding as directed by the statute, i.e., "the amount of damages and the percentage of negligence attributable to each party." The request and the finding are to be made only in connection with actions "to recover damages for negligence resulting in death or in injury to person or property." The necessity for the finding is thus mandated in this type of action.

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8. Section 1-1-109 reads:

"(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

"(b) The court may, and when requested by any party shall:

"(i) If a jury trial, direct the jury to find separate special verdicts;

"(ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;

"(iii) Inform the jury of the consequences of its determination of the percentage of negligence."

The court made the following findings of fact and conclusions of law in this case:

"FINDINGS OF FACT

"1. That Thomas Sawyer and Donald Cline entered into an oral agreement whereby Tom Sawyer would provide materials and Donald Cline, doing business as Cline Plumbing, a licensed plumber of the City of Sheridan, would supply labor necessary for the installation of water and sewer utilities in the construction of a mobile home park known as Wong Village in Sheridan, Wyoming.

"2. That Donald Cline did, in fact, install water and sewage utility lines on real property leased by Plaintiffs and was paid a total sum of $28,267.85. That portions of the sewage system failed to pass city inspection on the basis of water seeping into the sewage lines constructed by Donald Cline and under his supervision.

"3. That Donald Cline and workmen under his supervision and control wrongfully connected a waterline to a sewage line which necessitated re-excavating the connection site and tapping into a proper waterline.

"4. That as a result of the improper installation and faulty workmanship performed by Donald Cline or workmen under his supervision and control, Thomas Sawyer incurred the sum of $8,941.23 in payments to other contractors for corrective work to the water and sewage systems in Wong Village of Sheridan, Wyoming.

"5. Defendant performed $540.63 worth of labor for the benefit of Plaintiffs and has not been compensated for the same.

"CONCLUSIONS OF LAW

"1. Defendant failed to properly install portions of the sewage and water systems in Wong Village, Sheridan County, Wyoming, and thereby failed to perform his contractual obligations, and that such failure to perform the work in an ordinary workmanlike manner is breach of contract and negligence in performing the duties established under the construction contract.

"2. That the Defendant is liable unto the Plaintiffs for the sum of $8,941.23.

"3. That the Defendant is entitled to an offset in the sum of $540.63."

[7] If this is only a contract action, it may be said that these findings of fact and conclusions of law are sufficient. They reflect the existence of a contract, performance by appellees, its breach, and the resulting damages. As only a contract action, the findings required by § 1-1-109(b) would not be necessary. The same cannot be said if this is also a negligence action.

The complaint sounds in contract, but the answer sets forth defenses to a negligence action. The question is often determined at a pretrial conference since one of the purposes of such conference is to formulate and simplify the issues. Rule 16, W.R.C.P.; *Rhoads v. Gilliland,* Wyo., 514 P.2d 202 (1973). In this case, a pretrial conference was scheduled; and it at least started. There was no pretrial conference order, and the trial court commented at the inception of the trial that the conference was "aborted." However, on several occasions during the trial, the parties and the court referred to the pretrial conference in determining the propriety of exhibits and use of witnesses. In their pretrial conference memoranda both parties referred to negligence as an issue in the case. Appellant referred to it as such in his opening statement. Testimony pertinent to negligence on the part of appellant was

received, i.e., relative to connection of a water line to a sewer line, the installation of improper "saddle" connections instead of "in-line Y" connections, and whether or not such was attributable to appellant. Testimony pertinent to negligence on the part of appellees was received, i.e., improper engineering, designation of the fittings to be used by appellant, and designation and insistence on use of improper fill material. On the entire record, both parties seem to accept negligence as one of the theories of the case. In its conclusion of law number one, the trial court found appellant's actions to be a "breach of contract *and negligence* in performing the duties established under the construction contract" (emphasis supplied). Thus, it can be said that the trial was conducted on the theory of negligence as well as that of contract.

[8] This is not improper. In construction contracts, there is an implied warranty that the work will be performed in a skillful, careful, diligent and workmanlike manner. Where negligence on the part of the contractor results in a breach of this warranty, a cause of action ex contractu and a tortious action premised on negligence, or both, are available to the contractee. *Ferguson v. Town Pump, Inc.*, Mont., 580 P.2d 915 (1978); *Gilley v. Farmer*, 207 Kan. 536, 485 P.2d 1284 (1971); *McFeeters v. Renollet*, 210 Kan. 158, 500 P.2d 47 (1972); *National Fire Insurance Company of Hartford v. Westgate Construction Co.*, U.S.D.C. Del., 227 F.Supp. 835 (1964); *Tavares v. Horstman*, Wyo., 542 P.2d 1275 (1975); *New Trends, Inc. v. Stafford-Lowdon Co.*, Tex. Civ.App., 537 S.W.2d 778 (1976); 1 C.J.S. Actions § 47, pp. 1104, 1105; 17A C.J.S. Contracts §§494(2)b and 525(1); 65 C.J.S. Negligence § 4(6); 17 Am.Jur.2d, Contracts § 371. See *Brubaker v. Glenrock Lodge International Order of Odd Fellows*, Wyo., 526 P.2d 52 (1974).

[9] Although it is sometimes said that contributory negligence will not preclude recovery in construction contract cases premised on breach of this warranty, but will be considered in fixing the amount of damages, 17 Am.Jur.2d, Con-

tracts § 371, p. 815, consideration of such in Wyoming is rendered moot by the enactment of § 1-1-109 relative to comparative negligence.[9] It requires the apportionment of damages on the basis of fault unless the contributory negligence was as great as the negligence of the person against whom damages are sought. Assumption of risk is a form of contributory negligence in Wyoming. *Ford Motor Company v. Arguello,* Wyo., 382 P.2d 886 (1963); *Sanders v. Pitner,* Wyo., 508 P.2d 602 (1973).

[10] Inasmuch as the negligence action had for its purpose the recovery of damages for injury to the property of appellees, i.e., to their water and sewer line, and inasmuch as contributory negligence was an issue, the trial court was obligated by the provisions of § 1-1-109 to make "special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party." This was not done, and we must remand for this purpose.

The case should be treated as having been presented on the theory of contract and on the theory of negligence, with findings to be made on each. The findings which were made may be sufficient for the contract theory, and they may even be construed to indirectly cover the elements of negligence. But they do not apportion the percentage of negligence. The trial court may have had in mind an apportionment which would not allow any recovery by appellees on the negligence theory or which would not allow a recovery on the negligence theory in excess of that for which judgment was given. However, under § 1-1-109, the apportionment must be subject of a "special finding."

Affirmed in part, and remanded for revision and/or supplementation of the findings of fact and conclusions of law in accordance with the requirements of this opinion and for judgment in conformity therewith.

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9. See footnote 8.

APPENDIX F

Donald M. CLINE, Appellant
(Defendant),

v.

Thomas SAWYER and Loeva Sawyer,
Appellees (Plaintiffs).

No. 5316.

Supreme Court of Wyoming.

Oct. 23, 1980.

Suit was instituted for negligence and breach of warranty of workmanlike performance. The District Court, Sheridan County, Leonard McEwan, J., entered judgment for plaintiffs, and defendant appealed. After remand to apportion percentage of negligence, 600 P.2d 725, the Supreme Court, Rooney, J., held that: (1) evidence was sufficient to establish negligence on part of defendant plumbing contractor and breach of an implied warranty of contract to perform work in a skillful, careful, diligent and workmanlike manner in that defendant and workman under his supervision and control wrongfully connected water line to a sewage line which necessitated corrective work in form of reexcavating connection site and tapping into a proper water line, and (2) that plaintiff suppliers originally failed to obtain necessary approval of their plans from the Department of Environmental Quality and that later modifications were necessary to obtain that agency's approval was not a basis for establishing contributing fault in fixing damages where there was no evidence to show that errors made by defendant plumbing contractor in water and sewer workmanship were in any way related to failure of plaintiffs to meet agency specifications during early stages of construction.

Affirmed.

1. Contracts 322(3)
Negligence 134(1)

Evidence was sufficient to establish negligence on part of defendant plumbing contractor and breach of an implied warranty of contract to perform work in a skillful, diligent and workmanlike manner in that defendant and workman under his supervision and control wrongfully connected water line to a sewage line which necessitated corrective work in form of reexcavating connection site and tapping into a proper water line.

2. Negligence 136(9, 31)

Unless evidence is such that it can reasonably lead to one conclusion, question of negligence is primarily a question of fact, and duty to make comparison of negligence as required by comparative negligence statute is for fact finder if evidence can result in a difference of opinion. W.S.1977, § 1-1-109.

3. Master and Servant 315

The employer of an independent contractor is not responsible for contractor's inadequate acts unless the employer did not use due care in selecting that contractor.

4. Negligence 97

That plaintiff suppliers originally failed to obtain necessary approval of their plans from the Department of Environmental Quality and that later modifications were necessary to obtain that agency's approval was not a basis for establishing contributing fault in fixing damages where there was no evidence to show that errors made by defendant plumbing contractor in water and sewer workmanship were in any way related to failure of plaintiffs to meet agency specifications during early stages of construction.

5. Negligence 136(31)

Whether plaintiff suppliers contributed to any failure on part of defendant plumbing contractor to perform under con-

tract to install a water and sewer utility in construction of a mobile home park was for trier of fact in apportioning fault and fixing damages in case. W.S.1977, § 1-1-109.

Stuart S. Healy of Kennedy, Connor & Healy, Sheridan, signed the brief on behalf of appellant. Appellant's case was submitted upon the brief.

Bruce P. Badley and H. W. Rasmussen of Badley, Rasmussen & Shoumaker, Sheridan, signed the brief and Badley appeared in oral argument on behalf of appellees.

Before RAPER, C. J., and McCLINTOCK, THOMAS, ROSE and ROONEY, J. J.

ROONEY, Justice.

Appellant-defendant appeals from a judgment entered against him after a trial to the court, contending that the "findings of fact and conclusions of law * * * are not supported by the evidence." We affirm.

This is a second appeal in this matter.[1] Among the issues presented on the first appeal was whether or not the trial court erred in (1) failing to enter findings of fact and conclusions of law on specified issues as requested by appellant, and (2) that the findings of fact were not supported by the evidence. We found the findings to be deficient in failing to apportion the percentage of negligence as required by § 1-1-109, W.S.1977, and remanded the matter for such purpose, and we did not address the contention of error relative to sufficiency of the evidence to support the findings since the remand made such unnecessary. This second appeal again presents the sufficiency-of-evidence contention, the trial court having found appellant to have been 100 percent negligent and appellees to have been without negligence.

The standard by which we review the question of sufficiency of the evidence is well established:

> "* * * An appealing party has a heavy burden to overcome. We must assume that the evidence in

favor of the successful party is true, leave out of consideration entirely the evidence of the unsuccessful party that conflicts with it and give the evidence of the successful party every favorable inference which may reasonably and fairly be drawn from it. *Jelly v. Dabney*, Wyo.1978, 581 P.2d 622, 624; *Laramie Rivers Co. v. Pioneer Canal Co.*, Wyo.1977, 565 P.2d 1241, 1243-44; West's Wyoming Digest, Appeal & Error Keynumbers 931(1) and 989. . . . [S]pecial findings of fact * * * must be construed liberally and favorably to the judgment. We presume that they are right and where the findings of the trial court are not inconsistent with the evidence, clearly erroneous, or contrary to the great weight of the evidence, they will not be disturbed on appeal. *Diamond Management Corp. v. Empire Gas Corp.*, 594 P.2d 964 (1979); *LeBar v. Haynie*, Wyo.1976, 552 P.2d 1107, 1110. Moreover, the trial judge was present and observed at first hand the demeanor and expressions of the witnesses. We must not forget that when we examine the cold words of the transcript of testimony, we do not have the benefit of how the trial judge sees and hears the witness—the pitch of the voice, facial changes, the movement in the witness— all of which may tell a separate story, to be given credence. The conclusion of what preponderates is with the trier of fact. *Koch v. Brown*, Wyo.1965, 401 P.2d 459. Credibility of witnesses is for the trial court. *Hench v. Robinson*, 1955, 75 Wyo. 1, 291 P.2d 417; *Eblen v. Eblen*, 1951, 68 Wyo. 353, 234 P.2d 434. * * *'' (Footnote omitted.) *Madrid v. Norton*, Wyo., 596 P.2d 1108, 1117 (1979). And see *Stock v. Roebling*, Wyo., 459 P.2d 780, 784 (1969); *Brittain v. Booth*, Wyo., 601 P.2d 532, 535 (1979); *Craver v. Craver*, Wyo., 601 P.2d 999, 1001 (1979); *Shores v. Lindsey*, Wyo., 591 P.2d 895, 899 (1979).

The following Findings of Fact were made by the trial court:

"1. That Thomas Sawyer and Donald Cline entered into an oral agreement whereby Tom Sawyer would provide materials and Donald Cline, doing business as Cline Plumbing, a licensed plumber of the City of Sheridan, would supply labor necessary for the installation of water and sewer utilities in the construction of a mobile home park known as Wong Village in Sheridan, Wyoming.

"2. That Donald Cline did, in fact, install water and sewage utility lines on real property leased by Plaintiffs and was paid a total sum of $28,267.85. That portions of the sewage system failed to pass city inspection on the basis of water seeping into the sewage lines constructed by Donald Cline and under his supervision.

"3. That Donald Cline and workmen under his supervision and control, wrongfully connected a waterline to a sewage line which necessitated re-excavating the connection site and tapping into a proper waterline.

"4. That as a result of the improper installation and faulty workmanship performed by Donald Cline or workmen under his supervision and control, Thomas Sawyer incurred the sum of $8,941.23 in payments to other contractors for corrective work to the water and sewage systems in Wong Villiage [sic] of Sheridan, Wyoming.

"5. Defendant was one hundred percent negligent in the installation of the portions of the sewage system that failed to pass city inspection and for connecting a waterline to a sewage line while the Plaintiff was not negligent in either of these phases of contruction [sic] and for which the Plaintiff suffered the damages as set forth in Paragraph 4 above.

"6. That the Plaintiffs failed in their burden of showing that the corrective work performed by the Defendant was originally improperly or negligently done and therefore, no damages are awarded upon the other items of corrective work.

"7. Defendant performed $540.63 worth of labor for the benefit of Plaintiffs and has not been compensated for the same."

Before considering the evidence in support of these findings in accordance with the aforesaid standard of review, we refer to our analysis of the theories of this case as set forth in the first appeal of it. See 600 P.2d at 731-732. We there concluded that the trial was conducted on both the theory of contract and the theory of negligence. We said in part:

"This is not improper. In construction contracts, there is an implied warranty that the work will be performed in a skillful, careful, diligent and workmanlike manner. Where negligence on the part of the contractor results in a breach of this warranty, a cause of action ex contractu and a tortious action premised on negligence, or both are available to the contractee. [Citations.]

* * * * * * *

"The case should be treated as having been presented on the theory of contract and on the theory of negligence, with findings to be made on each. * * *" 600 P.2d at 732.

The first four of the trial court's findings were with reference to the contract theory. Finding 5 thereof was with reference to the negligence theory, and the last two findings were those upon which the court reduced the amount of damages claimed by appellees.

Evidence was presented and received that appellees had an agreement with appellant whereby appellant was to in-

stall water and sewer lines at appellees' trailer court; that appellant was the only licensed plumber on the project and was responsible for proper installation of the plumbing; that problems developed in the installed water and sewer lines in that a water line was connected to a sewer line, improper "saddle" connections were used instead of "in-line Y" connections, the proper gravity angle was not maintained for flow, and there was excessive leakage. Outside plumbers and backhoe operators were brought in to help correct the problems. Appellant was employed to do some of the corrective work.

Although appellant contends that some of the damage was occasioned by work of others, and as a result of appellees' insistence on use of improper fittings and fill material, and because of improper engineering, there was evidence from which the fact finder could conclude that appellant had breached his agreement by failing to install—or supervise the installation of—the sewage system to pass city inspection. As previously noted, our standard of review requires us to assume the evidence in favor of appellee to be true and not consider the evidence of appellant in conflict therewith.

[1] We cannot say, as a matter of law, that the evidence was insufficient to establish appellant's breach of the implied warranty of the contract to perform the work in a skillful, careful, diligent and workmanlike manner, or that it was insufficient to establish negligence on the part of appellant.

As noted in our first opinion in this matter, contributing fault is a proper consideration in fixing damages in construction contract cases premised on breach of warranty, 600 P.2d at 732.

Appellant's contest in this appeal is in truth a contention that the evidence did not support the percentage of contributing fault allocated by the fact finder in fixing damages under the contract theory, and similarly, in finding the degree of comparative negligence under the negligence theory.

[2] Unless the evidence is such that it can reasonably lead to one conclusion, the question of negligence is primarily a question of fact, and the duty to make the comparison of negligence as required by the comparative negligence statute is for the fact finder if the evidence can result in a difference of opinion. *Union Pacific Railroad Company v. Lumbert,* 10th Cir. 1968, 401 F.2d 699; *Knudson v. Hilzer,* Wyo., 551 P.2d 680 (1976); *Combined Insurance Company of America v. Sinclair,* Wyo., 584 P.2d 1034 (1978); 57 Am.Jur.2d Negligence §§ 6 and 454 (1971).

[3] It cannot be said that evidence of appellees' negligence or contributing fault was uncontroverted. There is a conflict in the testimony of the appellees and the appellant as to whether or not the appellant recommended that a different fill material be used or different fittings be used to connect the sewer and water joints. Evidence was presented which indicated that the fill material and the "saddle fittings" were acceptable under the then current standards, and that the materials used successfully passed regular city engineer inspections. Appellees employed a contractor to level the property in preparation for the construction. A substantial amount of fill material was brought in by the contractor to "stabilize" the portion of the property which had a high water table. The plans were drawn by a licensed architect. Appellees obtained some engineering assistance. Errors on the part of qualified experts employed by appellees are not necessarily imputed to appellees. Architects are generally considered to be independent contractors. 5 Am.Jur.2d Architects § 6 (1962). And, as a general rule, the employer of an independent contractor is not responsible for the contractor's inadequate acts unless the employer did not use due care in selecting that contractor. 41 Am.Jur.2d Independent Contractors §§ 24 and 26 (1968). Cf. *Combined Insurance Company of America v. Sinclair, supra; Stockwell v. Morris,* 46 Wyo. 1, 22 P.2d 189 (1933). Evidence of negligence in selection of the architect or contractor was not presented in this case.

[4] Although the record does show that the appellees originally failed to obtain the necessary approval of their plans from the Department of Environmental Quality and that later modifications were necessary to obtain that agency's approval, there was no evidence to show that the errors in water and sewer workmanship were in any way related to the failure of appellees' plan to meet agency specifications during the early stages of construction.

[5] The evidence was such that opinions could differ as to (1) whether or not appellees were negligent; (2) whether or not appellant was negligent (except that his negligence was admitted in connection of the water to the sewer); (3) whether or not appellant had performed the work under his contract in a skillful, careful, diligent and workmanlike manner (except for the same admission); and (4) whether or not appellees contributed to any failure on the part of appellant to perform under his contract. The questions were, therefore, for the trier of fact; and, since there was substantial evidence upon which he could have made the findings made by him, we cannot disturb such findings.

We note that the trial court refused to award to appellees a substantial portion of the $21,225.06 allegedly paid or to be paid to correct the allegedly improper work of appellant. Findings 6 and 7 reflect the failure of appellees to establish defective performance by appellant on all of the work performed by him. The trial court, therefore, did not attribute negligence or defective performance under the contract to all aspects of appellant's work.

Affirmed.

APPENDIX G

Brief of Appellant, Sheldon vs. Unit Rig & Equipment Co., United States Court of Appeals for the Tenth Circuit, No. 84-1322, 13 June 1984, p. 12.

This was a products liability case raising the issue of design and testing. Implied warranties of merchantability and fitness are well established causes of action against manufacturers of motorized vehicles and equipment in the areas of design and testing. Hursh, *American Law of Products Liability* § 3:44, p. 521. The warranty claim raised by the Plaintiff is the law of Wyoming and this Court. *Prehoda v. Edwards Hines Lumber Co.*, 399 F.Supp. 643 (D.C. Wyo. 1975); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th cir. 1978). The warranty theory was argued by both Plaintiff and Defendant in opening statements. Proof was taken on the elements of both Plaintiff's and Defendant's experts, and a factual question created. Plaintiff was entitled to have the jury instructed

APPENDIX H

Brief of Appellee, Sheldon vs. Unit Rig & Equipment Co., United States Court of Appeals for the Tenth Circuit, No. 84-1322, 3 July 1984, p. 12.

At another point in the *Ridenour* case (p. 1185), the Court said:

> "Finally and also importantly, we are bound by Woodward v. Haney, Wyo. 1977, 564 P.2d 844, where when asked to construe the Wyoming Comparative Negligence Act, this court stated:
>
> > '* * * Where a statute that has been construed by the courts of last resort of another state has been enacted in the same terms by the Wyoming Legislature, the Legislature is presumed to have adopted it as a part of the law and intended the same construction apply in this state. * * *' Id., 564 P.2d at 845.
>
> The conclusion was then reached that the legislature intended 'to adopt the Wisconsin judicial construction of the comparative negligence statute at the date of enactment. * * *' Id., at 846. We have, therefore, already decided the question. The precedent of this court should have some stability and should be abandoned only when there is no longer any reason for the rule. It gives us a firm anchor in this case."

Appellee does agree with Appellant's statement that "this is a products liability case raising the issue of design and testing." (Appellants brief p. 12) It being agreed that this is a products liability case, the Wisconsin cases resolving comparative negligence products liability cases are significant and controlling.

In *Dippel v. Sciano,* 155 N.W.2d 55, 63, 64 (Wis. 1967) the Court said:

> "The defense of contributory negligence is available to the seller. The plaintiff has the duty to use ordinary care to protect himself from known or readily apparent danger. Defenses among others that suggest themselves are that the product must be reasonably used for the purpose for which it was intended; abuse or alteration of the product

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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1047

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,
Petitioner,

v.

CARL SHELDON,
Respondent.

OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I. WAS THE COURT OF APPEALS' DETERMINATION OF AN UNSETTLED QUESTION OF THE LAW OF THE STATE OF WYOMING IMPROPER UNDER *Erie Railroad Company v. Tomkins*, 304 U.S. 64, 82 L.Ed. 1188?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,
Petitioner,

v.

CARL SHELDON,
Respondent.

OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondent, Carl Sheldon, respectfully files his opposition to the Petition for Writ of Certiorari in this case.

STATEMENT OF THE CASE

Petitioner's brief is adopted with the following additions:

1. Carl Sheldon was rendered one hundred percent disabled from his injuries. The original jury verdict of $540,000.00 reflected his loss of wages, and no other element of damages. The Tenth Circuit reduced this recovery to $324,000.00.

2. The jury made a general verdict in favor of the respondent, Sheldon, in addition to the percentages of negligence set out. At the motion for new trial, Unit Rig's attorney agreed with the trial judge that the instructions as given included a warranty instruction. The Tenth Circuit also found that the warranty instruction was given. That point was not raised on appeal. The jury made a finding of breach of warranty against Unit Rig.

3. Wyo. Stat. § 1-1-109 (1977) has since been modified by legislative action, and would allow Sheldon to recover a portion of his damages under the present Wyoming negligence statute. Wyo. Stat. § 1-1-109 provided, at the time of trial, that for a plaintiff to recover, his negligence had to be less than 50 percent, and less than the negligence of the defendant against whom he was seeking judgment. Wyo. Stat. § 1-1-109 has been changed to provide that a plaintiff's negligence must be less than 50 percent of the negligence, but that the negligence of all the defendants is combined to make that determination, and each defendant is responsible for his percentage of the negligence. So, in this case, under negligence theory, Unit Rig would be responsible for 30 percent of Carl Sheldon's damages. *See* Wyo. Stat. § 1-1-109, as amended 1986.

REASONS FOR DENYING THE WRIT

1. This case involves issues important only to the parties hereto, and not to the public in general. This is especially true with the modifications now made to the Wyoming comparative negligence statute. In all likelihood, the Tenth Circuit's decision will affect very few cases, even in Wyoming. Certiorari is normally granted only in cases involving issues important to the public in general, and not to individual parties. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

2. This case presents no important or special reason for granting certiorari, and does not fall within any of the reasons set forth in Rule 17 of the Supreme Court Rules.

3. Unit Rig's petition for rehearing to the Tenth Circuit was denied 9-0. (*See* Appendix C to Petition for Writ of Certiorari.) Judge Barrett, the active Tenth Circuit Judge from Wyoming, did not request en banc consideration, even though he was not on the original panel which heard the case. Evidently, Judge Barrett did not feel Wyoming law had been misconstrued.

4. The Court of Appeals was faced with making a determination of an unsettled question of Wyoming law; i.e., the effect of the comparative negligence statute on a warranty claim. The trial judge chose to ignore the effects of the warranty claim as it pertains to the Wyoming comparative negligence statute. On appeal, Unit Rig stipulated that the warranty issue was, in fact, before the jury, along with the negligence question; and that the jury's general finding in favor of the plaintiff was, in fact, a finding for the plaintiff on the question of warranty. The trial judge dealt with the issue of comparative negligence only, which left the warranty issue for the Court of Appeals to determine what the Wyoming law would be, under the facts of this case. The Court of Appeals had to anticipate what the Wyoming Supreme Court would do when confronted with the issues in this case.

5. The learned opinion of Judge Timbers, sitting by designation on the Tenth Circuit, correctly observed that

the Wyoming comparative negligence statute applies only to negligence actions. The statute does not deal with warranty claims. The question of the effect of the comparative negligence statute in Wyoming, now repealed, at the time of this case on warranty questions and products liability cases was undecided. There was no specific Wyoming decision to follow.

6. The Wyoming Supreme Court in *Cline v. Sawyer*, 600 P.2d 725 (Wyo. 1979), stated the general proposition that "contributing fault is a proper consideration in *fixing damages* in *construction cases* premised on breach of warranty." It is significant that the Wyoming Supreme Court did not say that contributing fault is a proper consideration in fixing liability. Further hints of tendencies in the jurisdiction of Wyoming was found in *Poland v. Goodyear Tire and Rubber Co.*, No. C83-0378 (June 24, 1984, D. Wyo.), wherein the federal district court, by a different judge, instructed his jury that contributory negligence does not bar recovery in a warranty action, but simply reduces the damages accordingly. This reference is found in footnote 3 of the Circuit Court's opinion.

7. The Tenth Circuit, in making its *Erie* determination, correctly applied the dictum in *Cline v. Sawyer*, that in warranty cases, the contributory negligence is used to balance the damages, and not liability. That was also consistent with the practice of the other federal district judge for Wyoming. All indications available to the Tenth Circuit were that the Wyoming Supreme Court will follow its dictum at such time as the issue is presented to it.

8. The Court of Appeals then properly noted that other jurisdictions have followed the rule announced in its opinion where the plaintiff's damages were reduced in proportion to his determination of negligence on a warranty claim. These cases are cited in footnote 3 of the Circuit's opinion.

9. There are no Wyoming decisions denying recovery in a warranty claim for injuries caused by a defective

product or where the degree of negligence or fault of the plaintiff is greater than that of the defendant, manufacturer, or dealer.

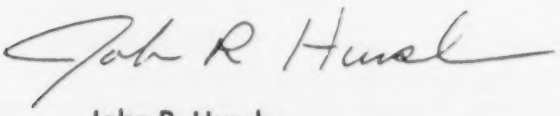
CONCLUSION

The Circuit Court did not misconstrue the *Cline v. Sawyer* case law or misapply the state's comparative negligence statute under a product liability case. The comparative negligence statute under which this case was decided has been repealed by the Wyoming Legislature and, except for this case, the question is an academic one. A breach of warranty was found by the jury and stipulated to by Unit Rig's counsel at oral argument. The question for the Court of Appeals was, what would the Wyoming Supreme Court decide, should the case be presented. The determination made by the Court of Appeals was consistent with the dictum in *Cline v. Sawyer*, and the instruction given by the federal court in the case of *Poland v. Goodyear Tire and Rubber Co.*, No. C83-0378 (June 24, 1984, D. Wyo.). It further has a basis in law from other jurisdictions.

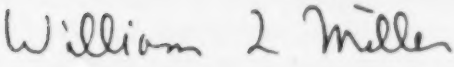
This case presents no issues of national significance, constitutional questions, federal questions or conflicts of circuits, as required by Rule 17 of the Supreme Court.

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



John R. Hursh



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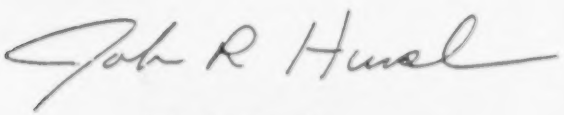
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, John R. Hursh, one of the attorneys for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1987, I served copies of this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

Glenn Parker
Thomas G. Gorman
Byron Hirst
HIRST & APPLEGATE
200 Boyd Building
P.O. Box 1083
Cheyenne, Wyoming 82003



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AFFIDAVIT OF MAILING

I, John R. Hursh, one of the attorneys for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1987, I deposited in the United States Post Office located at Riverton, Wyoming, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

John R. Hursh

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STATE OF WYOMING)
: ss.
County of Fremont)

SUBSCRIBED AND SWORN to before me this 19th day of January, 1987.

Carole Henning
Notary Public

My commission expires:
4-6-87